Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers	WC Docket No. 17-144
Business Data Services in an Internet Protocol Environment	WC Docket No. 16-143
Special Access for Price Cap Local Exchange Carriers	WC Docket No. 05-25

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INTRODUCTION AND SUMMARY

The Commission should confirm its findings that TDM transport services for price-cap LECs are sufficiently competitive in all areas to justify eliminating ex ante pricing regulation and tariff requirements for those services. The Eighth Circuit remanded the Commission's TDM transport decision solely on the ground that the Commission failed to give proper notice for the regulatory approach it ultimately adopted, not on the substantive merits of that approach or the adequacy of the factual findings supporting it. The Commission's findings are supported by an extensive factual record that was sufficient to uphold the Commission's other conclusions in the same proceeding. So while the Commission must cure the notice issue, it is permitted to reach the same conclusions regarding transport on the existing record, so long as it adequately considers the comments received. By contrast, it would require an extraordinary change in factual circumstances to justify a departure or reversal from the Commission's prior conclusions.

The Commission has long recognized that transport is more competitive and susceptible to competition than channel terminations and therefore should face less stringent regulations. There are also additional compelling rationales for the Commission to readopt its transport conclusions. Reversing course would upset industry expectations, disrupt carriers and their customers, and strain the overall business data services regulatory framework. In reliance on the rules the Commission adopted in 2017, Verizon and other providers have already withdrawn or revised their tariffs, made new price-cap regulatory filings, and modified their billing systems to provide TDM transport services consistent with the Commission's new rules. Reversing this would require months of effort and would inconvenience customers. That course of action would also be counterfactual.

I. The Commission's Prior Conclusions Regarding TDM Transport Are Supported by an Extensive Record

The *Business Data Services Order* reflected the culmination of "more than ten years of studying the business data services . . . market, numerous requests for comment, and a massive data collection."[1] Despite the Eighth Circuit finding that the Commission failed to give proper notice of eliminating ex ante pricing regulation for such services, the commenters and other parties that responded to the Commission's data request effectively treated the prior proceeding as if such notice existed, and provided extensive data with respect to transport.[2] That record was sufficient to support the Commission's findings that there was "strong evidence of substantial competition" for TDM transport in price-cap areas, including "widespread deployment of competitive transport networks" in such areas.[3] The record also supported the Commission's finding that "transport service represents the 'low-hanging fruit' of the business data services circuit, which makes it particularly attractive to new entrants."[4] And the record supported the Commission's findings that TDM services, including transport, relied on technology that "is becoming obsolete" and that is being replaced with packet-based services, which created market conditions conducive to "the deployment of competitive facilities, through either new entry or

[1] *Business Data Services in an Internet Protocol Environment*, Report and Order, 32 FCC Rcd 3459, ¶ 1 (2017) ("*Business Data Services Order*").

[2] *See, e.g.*, *id.* ¶¶ 79, 81.

[3] *Id.* ¶ 79; *Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers*, Report and Order, Second Further Notice of Proposed Rulemaking, and Further Notice of Proposed Rulemaking, WC Docket Nos. 17-144, 16-143 & 05-25, FCC 18-146, ¶ 151 (rel. Oct. 24, 2018).

[4] *Business Data Services Order* ¶ 82.

conversion."[5] As set forth below, the Commission may reaffirm its findings regarding transport based on this extensive record, and there are compelling reasons to do so.

II. The Commission Should Rely on the Existing Factual Record in Reaffirming Its Prior Conclusions

The Eighth Circuit did not address any of the Commission's findings with respect to competition for TDM-based transport services, nor its determination that such findings justified the removal of ex ante pricing and tariffing regulation of such services. The court remanded solely on the ground that the Commission had failed to provide adequate notice of the regulatory course it chose.[6] The court also affirmed the Commission's parallel findings and regulatory approach with respect to end-user channel terminations.[7] Although the Commission is required to seek further comments to cure the notice issue regarding transport, it is permitted to affirm its prior conclusions on the existing record, so long as it adequately considers the comments received. Indeed, it would require an extraordinary change in factual circumstances to justify a departure or reversal from the Commission's prior conclusions.[8]

As the D.C. Circuit has explained, "the usual rule is that . . . an agency that cures a problem identified by a court is free to reinstate the original result on remand."[9] And "[w]here

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[5] *Id.* ¶¶ 3, 26, 82.

[6] *Citizens Telecomms. Co. of Minn., LLC v. FCC*, 901 F.3d 991, 1006, 1015 (8th Cir. 2018).

[7] *Id. at* 1011, 1012-1013.

[8] *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-516 (2009) (when an agency reverses itself, it "must show that there are good reasons for the new policy"; "the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate," however, "[s]ometimes it must – when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account") (citation omitted). *See also Air All. Houston v. EPA*, 906 F.3d 1049, 1066 (D.C. Cir. 2018).

[9] *Heartland Reg'l Med. Ctr. v. Leavitt*, 415 F.3d 24, 29-30 (D.C. Cir. 2005) (citations omitted); *see also National Treasury Employees Union v. Federal Labor Relations Authority*, 30 F.3d 1510, 1514 (D.C. Cir. 1994) ("[W]e frequently remand matters to agencies while leaving open

the court does not require additional fact gathering on remand, . . . the agency is typically authorized to determine, in its discretion, whether such fact gathering is needed, . . . and how it should be accomplished."[10] The Eighth Circuit recognized in this case that the existing record might already support the vacated rule: "It may be true that the numerous comments received in the proceeding already discussed all relevant aspects of transport services."[11]

National Association of Regulatory Utility Commissioners v. FCC,[12] is instructive. In 1980, the Commission had issued a decision after notice and comment. Two years later, a common carrier sought a declaratory ruling to clarify the scope of the 1980 decision. The Commission invited public comments on the petition and eventually granted it, basing its substantive ruling "entirely on the factual record developed in the 1980 proceeding" because it deemed the analysis therein fully applicable to the issues raised in the petition.[13] NARUC (and others) then petitioned for judicial review, arguing in part "that the FCC acted arbitrarily and capriciously because it failed to make new findings of fact to support its decision in addition to the findings made in 1980."[14] The D.C. Circuit rejected that contention and upheld the Commission's decision because "petitioners have been unable to advance even a single meritorious argument as to why the 1980 record is not controlling."[15] Although clarification of a

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the possibility that the agencies can reach exactly the same result as long as they . . . explain themselves better or develop better evidence for their position.").

[10] *Chamber of Commerce of the U.S. v. SEC*, 443 F.3d 890, 900 (D.C. Cir. 2006) (citations omitted).

[11] *Citizens Telecomms. Co. of Minn., LLC v. FCC*, 901 F.3d 991, 1006 (8th Cir. 2018).

[12] 746 F.2d 1492 (D.C. Cir. 1984).

[13] *Id.* at 1497.

[14] *Id.* at 1501.

[15] *Id.* at 1502.

Commission rule is a different context than reaffirming a rule vacated for insufficient notice, this case establishes that the Commission may rely on an earlier factual record that sufficiently resolves the question.

Thus, the Commission need and should only consider whether any new information confirms or conflicts with its prior conclusions. Assuming that new information demonstrates that the overall state of competition has remained the same or increased, as the Eighth Circuit expressly anticipated, the Commission can and should reaffirm its prior conclusions.

III. There Are Additional Compelling Reasons for the Commission to Reaffirm Its Conclusions with Respect to Transport

As set forth above, both the facts and the law support the Commission reaffirming its decision to eliminate ex ante pricing regulation and tariffing of TDM-based transport services. There are also additional compelling reasons for the Commission to adopt this approach. Reversing course would upset the expectations of both suppliers and purchasers of business data services transport. As the Supreme Court held in *FCC v. Fox Television Stations*, an agency faces a higher burden of proof for a change in policy "when its prior policy has engendered serious reliance interests that must be taken into account."[16] Eliminating ex ante regulation of transport services would also conflict with the overall business data services regulatory framework, by subjecting transport services to greater regulation than end-user channel terminations, despite the Commission's prior findings that transport services were even more likely to be competitive.

Numerous industry participants informed the Eighth Circuit that they have already made significant and costly changes in reliance on the Commission's decision to eliminate ex ante

[16] 556 U.S. 502, 515 (2009).

pricing regulation of business data services, including transport.[17] In the case of Verizon, for example, it took over nine months to change our billing systems (CABS) and tariffs, which involved five separate regulatory filings. To reverse these changes, we would need to modify complex billing logic in our systems, including programming CABS to recognize how to bill transport in different ways depending on the rate elements associated with each circuit. We would be required to implement a new and distinct billing logic for transport rate elements (POP Channel Terminations, Mileage and Multiplexing) based on the old MSA-based regulatory structure, while the billing logic for end-user channel terminations would be based on the new *Business Data Services* structure. We anticipate that dismantling our current billing logic for transport and reinstituting logic consistent with the prior regime would take months to complete.

A change in course would also require us and other price-cap LECs to revise price-cap filings and to refile tariffs. We have made three price-cap filings since the *Business Data Services Order*. For example, we modified our price-cap model to exclude transport elements, which reduced the size of the model from about 20,000 data lines to just over 4,000. We have not updated the model to account for transport demand since the 2017 annual filing covering the 2016 calendar year. To effect this, we would need to make one filing to reverse the impact of the previous filings, and another new filing to implement whatever new policies the Commission adopts. To revise our transport demand model, we would not only have to add back approximately 16,000 data lines to the model, but also would have to collect, process, and

[17] *See, e.g.*, Response of ILEC Intervenors in Support of FCC Motion to Stay the Mandate, *Citizens Telecomms. Co. of Minn., LLC v. FCC*, Nos. 17-2296, 17-2342, 17-2344 & 17-2685, at 2 (8th Cir. filed Oct. 22, 2018) (Intervenors USTelecom, AT&T, and CenturyLink stated that "carriers have made many changes in reliance on the 2017 rules – for example, by transitioning transport services from intricately regulated tariffed offerings to negotiated contracts that often also include negotiated terms and conditions for other services.").

populate data for 2017 and 2018. The Wireline Competition Bureau would, of course, need to review and approve these changes. We also would be required to refile all of the price-cap rates for transport elements, which affect hundreds of tariff pages that have already been modified.

Finally, if the Commission were to reverse course and reinstate pricing and tariffing regulation for transport service it would result in a counterfactual and paradoxical regime in which transport services in some areas were more heavily regulated than channel terminations. This would conflict with decades of policy that regulated channel terminations more heavily, based on the greater economic hurdles associated with deploying competitive channel terminations as compared to transport services.[18] As the Commission has recognized, transport services are "particularly attractive to new entrants," and "competitors often enter the transport market before the channel termination market," because the returns from providing channel terminations "would be expected to be significantly less" than from providing transport.[19] It would therefore make no sense and be uneconomic for the Commission to reverse decades of policy and regulate transport services more stringently than channel terminations.

[18] *See Business Data Services Order* ¶ 77.

[19] *Id.* ¶ 82.

CONCLUSION

For all these reasons, the Commission should confirm its prior findings that TDM transport services for price-cap LECs are sufficiently competitive in all areas to justify eliminating ex ante pricing regulation and tariff requirements for those services.

Respectfully submitted,

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